SOUTH COAST HOMEOWNERS ASSOCIATION

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IN THIS ISSUE

Please join us for our summer meeting as South Coast HOA member and nationally known HOA insurance expert Tim Cline from the Timothy Cline Insurance Agency in Santa Monica will make a detailed presentation on current HOA insurance issues. Among the topics that will be covered:

1). Directors & Officers (D & O) Liability - why consider a standalone D&O policy, rather than the coverage provided in the package?

2). Fannie Mae's New Insurance Guidelines (per the Fannie Mae announcement on December 16, 2008). – How this will affect purchase and refinance loans

3). Insurance ramifications of the Virginia Graham Baker Pool Act.

4). Heightened insurance concerns because of the current economy.

5) Workers comp coverage for uninsured or self-employed contractors - who pays

6). Eight "Take Away" Risk Management Suggestions

7). Insurance Marketplace: Pricing concerns as Boards prepare their budgets.

8) And more!

Date/Time – Wednesday, July 22, 2009 – 7 PM
Place - Encina Royale Clubhouse
250 Moreton Bay Lane, Goleta

ASSESSMENT COLLECTION IN AM ECONOMIC CRISIS

By
Paul W. Windust, Esq.

Editor's Note: Mr. Windust is a member of the Berding & Weil law firm in Alamo, California. We have been privileged to run several articles written by their attorneys over the years with their express permission. This article ran in the ECHO Journal late last year. They can be contacted through their website – www.berding-weil.com

California law affecting non-judicial and judicial foreclosure of assessment liens can be complex. Recent legislation illustrates a governmental policy favoring the resolution of many assessment disputes in Small Claims Court. This, coupled with reduction of property values and equity brought on by the current economic crisis and real estate meltdown, can make assessment collection in Small Claims Court an efficient (if not the most efficient) way to collect assessments.

Statutory Assessment Collection

The standard method of assessment collection employed by community associations follows the procedure set forth in the Davis-Stirling Act (Civil Code §§1350 et seq), concluding with a non-judicial foreclosure sale. Under this method, a community association writes to the delinquent owner and requests payment of past due assessments. If the informal letter is unsuccessful, the association typically engages a collection agency to pursue collection of the account. The collection agency prepares and mails via certified mail the statutorily required pre-lien notice, which usually includes an offer to "meet and confer." At least thirty days later, if the account remains unresolved, the board of directors will meet and decide whether to authorize the agency to record an assessment lien against the delinquent owner's property (a "unit" in a condominium project or a "lot" in a planned development).

If the account remains unpaid 30 days after recording of the assessment lien, the association is free to enforce the lien in any manner permitted by law, including sale by the court (by bringing a lawsuit for judicial foreclosure), or sale by the trustee designated in the notice of delinquent assessment (without going to court via a non-judicial foreclosure). In the non-judicial context, the sale is handled pursuant to the statutory procedure for non-judicial sale of a mortgage or deed of trust (i.e. the process used by banks foreclosing on delinquent mortgage payments). Under this procedure, the trustee records a Notice of Default which triggers a ninety day period before which a Notice of Trustee's Sale can be recorded. If the account remains unresolved after ninety days, the trustee can the records a Notice of Trustee's sale setting forth the time and place of the sale.

If the sale occurs, and no one outbids the association, the trustee executes a Certificate of Sale putting title of the property in the name of the association. Completion of the sale commences a 90 day right of redemption period under which the (now former) owner has the right to regain title to the unit provided he or she pay the association the delinquent assessments and foreclosure charges owed. If the owner fails to redeem, the association

receives a Trustee's Deed to the property. Importantly, the association's ownership is subject to existing debt secured against the property, including the first mortgage and deed of trust.

Under this process, the goal of the association is to have the owner pay the delinquent assessment or risk losing the unit, including its equity. Equity is calculated by taking the fair market value of the unit and subtracting all recorded and outstanding liens recorded against the unit. For example:

Unit fair market value	$350,000
1st Mortgage to ABC Bank	($200,000)
2nd Mortgage to XYZ Bank	($ 50,000)
Assessment Lien (and costs)	($ 5,000)
Equity	$ 95,000

The prospect of losing $95,000 in equity is the driving force that motivates the owner to pay the delinquent assessment before the non-judicial sale occurs. This is the association's desired result. Further, the opportunity to obtain a property, and its equity, for a relatively nominal amount (the unpaid assessment and the association's foreclosure costs) provides an incentive for third parties to attend the sale and bid at the non-judicial foreclosure sale, thereby completing collection of the delinquent assessment. The right of redemption reduces somewhat the marketability of a property because a third party bidder takes the property subject to the owner's right to regain title. However, to redeem the unit, the foreclosed owner would need to pay the third party bidder the amount paid at the sale to acquire the unit. During the right of redemption period, neither the association nor the successful bidder may evict the (now) former owner.

A successful bidder at a non-judicial foreclosure sale, be it the association or a third party, acquires the unit subject to all senior liens. This means that the successful bidder will either need to assume the loans relating to the senior liens, or pay them off. If the obligations owed to the senior lien holders go into default, through non-payment or otherwise, the party that acquired the unit at the non-judicial foreclosure sale faces the same fate as the delinquent assessment owner.

Assessment Collection in the Current Environment

In the scenario described above, the association's leverage lies in the fact that the property has equity and it is that equity that is the "target" of the foreclosure. This leverage is lost, however, if the property has little or no equity. This is the issue faced by many associations in today's economic climate and falling property values. The statutory method of assessment collection is no longer an attractive option to resolve delinquent assessments. Many times, an owner will stop paying maintenance assessments but continue to service the mortgage debt on the property. Non-judicial foreclosure of an assessment lien will not motivate this owner to pay the delinquent assessments because he has no equity to protect. Here, an association is saddled with an owner that refuses to pay his assessments with only the unattractive option of non-judicial foreclosure. The owner remains in the unit or lot, using his or her share of common area amenities and benefitting by association purchased services

(including management and insurance), but failing to contribute his or her assessment dollars for these amenities and benefits.

Consider the following example:

Unit value at purchase:	$350,000
Unit current fair market value	$250,000
1st Mortgage to ABC Bank	($200,000)
2nd Mortgage to XYZ Bank	($ 50,000)
Assessment Lien and costs	($ 5,000)
Equity	($ 5,000)

Here, the association's lien attaches to nothing because there is no equity in the unit to secure it; the association is an unsecured creditor. Essentially, the association has not improved its position vis-a-vis the delinquent owner by recording the assessment lien. If the association completes a non-judicial foreclosure sale, it will obtain title to a unit worth $250,000 but encumbered with senior liens in the amount of $250,000; the association obtains nothing. Likewise, because there is no equity in the unit, third parties have no incentive to bid at the sale. Further, now the association will have to incur the expense of insuring the unit, and evicting the occupant. Worse, if the association does not service the senior mortgages, it will foreclose, leaving the association with nothing other than an obligation to pay collection and foreclosure charges.

In other common situations, the owner cannot pay his mortgage lender, which forces the lender to foreclose to protect its own equity position. If the association recorded an assessment lien, it is likely junior to the mortgage lien, and will be wiped out when the senior lender forecloses. In this situation, the property is no longer available to collect the assessment. Many times, associations assume that once their assessment lien is wiped out, they can no longer collect the delinquent assessment and so will write off the debt.[1] This assumption is in error. Under California law, the obligation to pay assessments is the debt of the owner and it is personal to him or her. The ability to lien and foreclose is merely an enforcement technique. If an owner is foreclosed by his or her lender, wiping out the association's assessment lien, the now displaced owner *still owes the association the amount of the delinquent assessment.* Even though the unit is no longer available for collection, the owner may have other assets (a job, a bank account, brokerage accounts, a car) that the association may look to for collection.

Assessment Collection Emphasizing Collection Against Owner's Other Assets

An owner's other assets can be made available for assessment collection by filing a civil lawsuit, either in Small Claims Court or Superior Court. The object of such a lawsuit is obtaining a civil money judgment for the amount of the delinquent assessment, late charges, interest, collection costs, and attorneys' fees. These judgments are relatively easy to obtain

[1] The term "write off" is an accounting term used to describe the accounting function of recognizing that an account receivable can no longer be considered an asset of the corporation. To accurately report the association's financial condition on a balance sheet, the association must write off the delinquent assessment and recognize it as uncollectible. That does not mean, however, that the association is prevented from legally enforcing the debt.

and are enforceable for 10 years. Further, they can be renewed for another ten years if unsatisfied. Of particular note, judgments can be recorded with the county recorder to create a judgment lien. This lien can attach to after-acquired property. In other words, the association can obtain a lien on real property that the delinquent owner may own *in the future.*

Assigning Judgments for Money based on Non-Payment of Assessments

Under California law, judgments are tantamount to a judicial contract between the plaintiff and defendant and are freely assignable. In other words, an association can sell the judgment (usually at a discount) to an investor or collection agency that may be willing to track down the debtor-owner to collect the judgment amount. Hypothetically, an association can obtain a small claims judgment against a delinquent owner in the amount of $5,000. It can then sell that judgment to an investor for 20 cents on the dollar - recovering $1,000 to meet its current operating needs. For large associations, the ability to bundle up many judgments for sale may be an untapped source of revenue needed to fund operations.

Significantly, assessment liens are very different than other types of real property liens. Under Civil Code §1367.1(g) an association may not "voluntarily assign or pledge the association's right to collect payments or assessments, or to enforce or foreclose a lien to a third party. . ." There is an exception to this rule when the association assigns or pledges the right to collect or foreclose to a financial institution or lender as security for a loan obtained by the association. Another exception permits the association to assign any unpaid obligation *of a former member* to a third party for collection. In other words, once a delinquent owner is foreclosed and no longer a member of the association, the association is free to sell or assign the obligation to a third party.

What about a situation where the association obtains a small claims judgment against an owner that is still an association member? Can it still sell or assign the judgment? There is no California case that analyzes this situation. An aggressive reading of Civil Code §1367.1(g) suggests that it can. Subparagraph (g) prohibits assignment of assessment liens, not judgment liens. An assessment lien is created by an association board of directors without judicial oversight. A judgment lien, on the other hand, arises from a judgment entered by a court with jurisdiction over the parties and after review of the evidence presented. Therefore, an argument can be made that subparagraph (g) does not prohibit assignment or sale of a judgment lien arising from a money judgment for unpaid assessments.

Another unique feature of assessment obligations is that they are exempt from California's "one action" rule. Under this rule, the recovery of a debt or the enforcement of any right secured by real property must occur by a judicial foreclosure action. In other words, the one action rule compels a creditor to seek judicial foreclosure of a debt secured by real property. Enforcement of an assessment lien is exempt from this rule. This means that an association may record an assessment lien, and then proceed to civil court and obtain a money judgment for the delinquent assessments. This is an important right because it allows the association to make its claim for the delinquent assessment on the property itself, thereby ensuring payment in the event the unit is sold or re-financed. To the extent the unit has any equity, the association is secured. However, if the association determines that the unit does not have sufficient equity to secure the lien, it can still proceed to court to obtain a money judgment for the assessments owed, keeping its lien in place. On the other hand, it is doubtful that an

association can complete the foreclosure process and then seek recovery against the owner for any "shortfall".

Suggested Collection Route

A better approach to assessment collection in the current market might look like the following:

1. The association discovers that a particular unit has failed to pay assessments and issues its informal demand that the assessment account be brought current.

2. Following the association's collection policy, the association refers the account to its collection agency for preparation of a statutory pre-lien notice letter.

3. After 30 days, the collection agency reports that the account remains unpaid; the board of directors resolves at a regularly noticed meeting to record a Notice of Delinquent Assessment - an assessment lien. The association now has a lien on title and is secured to the extent the unit has any equity. If the unit is sold or re-financed, the lien will have to be paid to convey clear title. Alternatively, the association's management company or its counsel may be authorized to send the demand letter and record the lien (the options may in part turn on how much the agency, manager or attorney will charge simply to do the demand letter and lien).

4. At this point, the board obtains basic property information to determine if it is likely the property has equity. If not, foreclosure is not pursued. Instead, the association through the board or its manager, files an action in Small Claims Court (for debts up to $5,000) or Superior Court (for debts over $5,000) to obtain a money judgment in the amount of unpaid assessments, interest, late charges, and attorneys' fees, if applicable. The Court enters a judgment against the owner for the amount owed as of the date the judgment is entered. The filing fee for small claims court is around $100.00.

5. The association may enforce the money judgment against assets of the owner by garnishing wages, attaching bank accounts, or any other method set forth in the Enforcement of Judgments Act. This judgment is enforceable for 10 years regardless of whether the debtor is an association member or not. An association may need to consult with legal counsel to assist in enforcement of the money judgment.

6. In the event the owner is foreclosed on by his or her lender, the assessment lien is extinguished. However, the assessment debt remains enforceable and the association may file a civil lawsuit against the now former owner for the unpaid assessments, interest, late charges, and attorneys' fees, if applicable.

Small Claims Court Procedure

Code of Civil Procedure section 116.540 authorizes an "agent, management company representative, or bookkeeper" for a community association to appear in Small Claims Court. Under the old law, a manager could appear in Small Claims Court only if he or she was an employee of the association. This is a radical exception to the basic rule that only attorneys can appear in court on behalf of a client or other third party.

<u>Declaration confirming manager's authority to appear on association's behalf</u>

To appear in Small Claims Court on behalf of an association, the manager will be required to provide the court with a signed declaration under penalty of perjury attesting to the fact that he or she is authorized to appear on the association's behalf and the basis for that authority. The manager will also need to make a representation that he or she was not hired by the association solely for the purpose of appearing in Small Claims Court. Until the new changes in the law become known, managers should take a copy of the statute to Court or at least be prepared to direct the Small Claims Court to the correct section of law so that the court will understand that a manager *can* appear on an association's behalf.

Tips for a successful presentation of the claim

Initiation of a Small Claims Court case is relatively easy. Many courts have small claims forms on-line which can be downloaded from the internet. A small claims complaint is a one page document which requires the plaintiff to provide name and address of the defendant and to briefly describe the nature of the dispute. Once the association files the case and pays the filing fee, the court will issue a hearing date. The association then needs to have a process server serve the owner with the complaint and notice of hearing at least 15 days before the hearing. The proof of service must be filed with the court five days in advance of the hearing. The association may recover the filing fee and service fee in the case.

When appearing in Small Claims Court, the key is to be prepared with your evidence and be as clear and concise as possible. The Judge may have 20 cases scheduled that day and a limited time within which to hear them. Therefore, the Judge will appreciate a party that gets to the point quickly. Remember that the Judge knows nothing about your case. A few brief statements about who you are, who you represent, and why you are in court will give the Judge a thumbnail sketch about what kind of evidence he or she is about to hear.

In making your presentation, you should have the following documents as "evidence" to support your delinquent assessment claim:

1. The CC&Rs which authorize the association to levy assessments
2. The association's collection policy
3. Letters asking the owner to pay the assessment
4. An itemized statement of the owner's account showing the delinquent assessments

Presenting your case in chronological order will make the most sense to the Judge. Start with a brief discussion of the association. Tell the Judge where the development is located, how many owners there are, the amount of the monthly assessment, and that the association is governed by a set of CC&Rs that authorize it to charge assessments for the maintenance, repair, and reserves of the association. Explain to the Judge that under the association's collection policy (and the Davis-Stirling Act), an assessment is delinquent if not paid within 15 days of its due date. You will need to explain that the association is entitled to recover late fees and interest on the delinquent assessments. Also, tell the Judge that when one person does not pay his or her assessments, the other paying members are forced to bear added maintenance, repair, and reserve obligations.

Next, tell the Judge that the association maintains a statement of account for each member. Give the Judge the details on how the account is maintained. For instance, tell the Judge that the payments go to a lock box which gets digested into a report that the association uses to keep the statement up to date. Basically, the Judge needs to be able to rely on what the account statement shows as a delinquency. Tell the Judge exactly what is owed, the late fees, and the interest and ask the Judge for judgment in that amount.

After you conclude, the debtor will be able to present a defense. Many times the debtor will not appear because he or she will have no defense. Owners that have refused to pay because they are unhappy with management or the Board likely will appear and argue that they have not paid because they have not received the services for which they are paying. California cases have held that such an argument is not a good reason to withhold assessment payments. Further, the Davis-Stirling Act provides for an informal dispute resolution procedure within the community that allows the owner to meet with the Board or Board representative if he or she objects to something the Board has decided. "Meet and confer" provisions are found in the Civil Code beginning with section 1363.810.

At the conclusion of the hearing, the Judge will enter a judgment. If the judgment is in the association's favor, it can be enforced just like any other money judgment. Under the rules, the judgment is stayed for 30 days, which means it cannot be enforced during that time. After 30 days, the judgment can be recorded to create a lien on the owner's unit. The association can undertake an execution sale to foreclose on its judgment lien. The judgment can also be used to levy the owner's bank account or garnish his or her wages. If the Judge rules against the association, there is no opportunity to appeal. However, that does not mean that future assessments are not owed, it only means that the association has not persuaded this Judge in this circumstance. If the judgment is in the association's favor, the owner may appeal to the Superior Court and request a new trial. In such a case, the association can retain legal counsel to represent it in the trial proceeding.

Summary

In a "good" market, property appreciates and an assessment lien and the threat or actual foreclosure of the lien is likely to result in payment to the association. In a "down market" where property value collapses, there may not be enough equity to satisfy all debt holders, including the association. Thus, pursuing collection against the property may have little benefit (other than perhaps resulting in its ownership but a new paying owner). There are alternatives: suing in small claims court or, for larger claims in which it makes economic sense to hire a lawyer, suing in Superior Court.

MY SMALL CLAIMS COURT EXPERIENCE

By: Michael J. Gartzke, CPA

In the past year, I have had the "opportunity" to present collection information at Small Claims Court on behalf of two associations. In each of these cases, I had been involved in the billing and collection of monthly assessments including sending late notices, statements of account, etc. I know that many of you, especially our manager members, have much more experience

in small claims than I have. Perhaps there is something in my experience that you can use as you pursue assessment collection.

Situation 1: Owner purchases unit and immediately falls one month behind. In addition, the owner pays less than the monthly assessment when payments are received. Late notices and statement of account are sent by the association. No response is received from the owner. A second month is missed and when the association assessment changes at the first of the year, no adjustment is made to the payment when the owner makes it. Still no response from the owner. The Association is more than patient. This goes on for over a year. The Association files a small claims case. The owner is livid. He makes calls berating the manager, the Board President and me.

Both parties arrive at the small claims hearing. The association presents its accounting and the owner provides a response. The owner tells the judge that he doesn't read mail that he receives from the association. This owner is highly educated and holds a professional license granted by the State of California. So the judge chastises the owner for not being responsible and then disallows the collection costs incurred by the association (manager time and accountant time) involved in collecting the debt. The judge makes this finding contrary to Civil Code 1367.1(d) which allows "reasonable" costs of collection. In making this finding, the judge requires that all responsible members of the association pay for the collection costs of those who are not responsible. As one of our manager members noted, going to Small Claims is a crapshoot – you have no idea how the judge will rule. The owner was dancing in the court house on his way out. He beat the association out of its collection costs. On the plus side, perhaps he has learned his lesson. He now pays the correct assessment on the first of every month and has been current for over a year.

Situation 2: Owner stops paying assessment after being consistently on time during the three years that he owned the property. A pre-lien letter is filed after 2 months' delinquent. It is determined that the owner purchased the unit with no money down in 2004 and with the subsequent decline in real estate values, there is immediate concern in this 20-unit association that 5% of its income is no longer being received. After 4 months, some puzzling correspondence was received from the lender. It appeared that the owner had filed for bankruptcy but the association had not been notified by the bankruptcy court. Calls and correspondence to the bankruptcy attorney and trustees went unanswered. I was trying to determine when the creditors' meeting was. This meeting is where the creditors (such as the HOA) meet with the owner, attorney and trustee to discuss the owner's financial situation, who is owed money and how the bankruptcy will affect debts owed. Though I had contacted the attorney and trustee before the creditor's meeting, they did not respond and so the association was not represented at the meeting. After numerous calls, it was determined that a "clerical error" that no one would take responsibility for was the cause of the lack of notification. A P. O. Box number was misstated. In order to get any information about the bankruptcy, I had to go down to the US Bankruptcy Court in Santa Barbara and research the status myself.

My understanding of bankruptcy is that for an association with unsecured assessments, "pre-petition" assessments (those assessed prior to bankruptcy) are wiped out but "post-petition" assessments (those assessed after the bankruptcy filing) are still valid and owed by the owner while he owns the property. As noted in the preceding article in this newsletter, these

assessments are the debt of the individual former owner if the property is transferred without the payment of past assessments.

The lender had removed the condo from the bankruptcy proceeding. The lender proceeded with a foreclosure, but that did not occur until 13 months after the bankruptcy started. Lenders have been reluctant to foreclose HOA units because they become responsible for the assessments once foreclosure is complete. So in this case, the association lost the four months' assessments prior to the bankruptcy filing but there remained the 13 months' assessments prior to foreclosure.

A small claims case was filed after the foreclosure against the former owner. The bankruptcy attorney called me and stated that since his client was bankrupt that the judge would dismiss the case and that his client would owe no money. It would be a waste of the association's time to lose the case. I pointed out the difference between pre- and post-petition assessments to him to no avail.

The judge in this case was a "judge pro-tem". A judge pro-tem is one of the area attorneys who provides this service to the court. This attorney has done so for 20 years. He listened to the association's case and then asked the former owner for his position. The former owner stated that since he filed for bankruptcy and the bank had foreclosed, he owed nothing. The judge received documentation showing the bankruptcy date, the write-off of pre-petition assessments and date that the property was transferred back to the bank, leaving the 13-month post-petition period of ownership. The association won its case and now has a judgment. The fun part will be collecting the amount owed from the former owner.

While I was at the last hearing, there was another case involving an association collecting unpaid assessments. (I wasn't a party to this hearing). The owner complained that the association had imposed a special assessment and that she didn't see what the association had done with the special assessments so she wasn't going to pay it (along with several months of regular assessments). The judge was not swayed and told her she owed the assessments.

More and more associations are incurring losses as a result of uncollected assessments. As noted earlier, more homes and units were purchased with no money down or with very limited funds. Many of these owners have no ability to pay assessments or simply have no desire to pay assessments, resulting in increased legal/collection and management costs and a redistribution of costs to the remaining owners. There is currently a 90-day moratorium on foreclosures by lenders in California from June 1st until September. This will delay the assumption of properties by banks and lenders resulting in more losses for associations because this will most likely add three more months of delinquent payments to the totals already owed by owners nearing foreclosure.

SUMMARY OF 2008 APPELLATE COURT DECISIONS

By: LOEWENTHAL HILLSHAFER & ROSEN, LLP

Editor's Note: Attorney David Loewenthal provided this summary of California Court Cases at our legal update meeting earlier this year. These court decisions can provide useful guidance in interpreting California HOA legislation. David's contact information appears on the sponsor page at the end of the newsletter.

1. **Harvey v. Landing HOA 162 Cal.App.4th 809**

Background: Condominium homeowner Harvey brought an action for trespass, breach of fiduciary duty and injunctive relief against homeowners' association, members of homeowners' association board of directors, and homeowners with attic access. The Superior Court granted summary judgment for defendants. Homeowner appealed.

The Landing is a 4 story 92 unit condo structure in Coronado. On the fourth floor, each of the 23 units has attic space designated as common area. For fifteen years, several fourth floor unit owners at The Landing had been using (without HOA approval) the common area attic spaces next to each of their units for storage. Each of these attic spaces was only accessible to the adjacent unit. After one owner complained, the board of directors conducted an investigation.

The board eventually decided that, based upon their interpretation of the CC&Rs and the results of their investigation, it would grant each owner a license to use 120 square feet of their adjacent common area attic space for storage, provided that the owner signed a permission form and obtained insurance. Additionally, the directors amended the Association rules to specifically allow the fourth floor owners to use their adjacent attic spaces, conducted an election wherein the membership overwhelmingly approved the rule change, and passed a resolution transferring to fourth floor owners the exclusive right to use the common area attic spaces. The complaining owner believed that the board had improperly given away part of the Association's common area to individual owners, and sued the association.

Harvey appealed on the basis that:

1. The board acted outside the scope of it's authority in granting use of the common area exclusively to the fourth floor owners;

2. The board lacked the power to amend the CC&R's and

3. The board action was invalid because the Board lacked a disinterested majority as some owned fourth floor units.

Holdings: The Court of Appeal, Benke, *3.,* held that:
(1) granting right to use common area in attic for storage was within board's authority;

(2) board of directors acted upon reasonable investigation, in good faith, and with regard for interests of community; and

(3) there was no conflict of interest in authorization to use attic.

The court found that the Association's CC&Rs did not require that the board act in a specific way. Instead, the governing documents gave the board the discretion to decide whether the fourth floor owners could use the adjacent common areas for storage. Therefore, the court's responsibility was to defer to the Board's "authority and presumed expertise regarding its sole and exclusive right to maintain, control and manage the common areas." As such, just because some of the directors that made the dedication were also owners of benefited units did not render the decision impermissible because of them being "interested directors." As such, when a Board has certain interested members, so long as a majority of disinterested Board members vote to approve a decision after a full disclosure of the vote, the court will not interfere and will defer to sound board decisions.

2. Fourth La Costa Condominium Owners v Seith 159 Cal.App. 4th 563

Background: The Board of Directors for the Fourth La Costa Condominium Owners Association desired to restate its CC&Rs and Bylaws. The documents had been in effect since 1969 and had never been amended. The Board wanted to delete the provisions which pertained to the developer, clarify ambiguous provisions, and bring the documents up to date with current law. Both the CC&Rs and the Bylaws required approval of seventy-five percent (75%) of the voting power of the Association. Additionally, the CC&Rs required approval of seventy-five percent (75%) of the holders of mortgages or deeds of trust ("Lenders") to approve any amendment.

The Association mailed proposed First Restated CC&Rs and First Restated Bylaws to the Owners of the 48 Units asking for approval of both documents. The Association held an informational meeting about the proposed restated documents and mailed reminders to the Owners regarding the vote. Despite these efforts, the Association did not obtain approval of seventy-five percent (75%) of the voting power for either document. However, the Association did obtain approval from a majority of the total voting power. Twelve (12) Units did not vote.

As such, the Association mailed, via certified mail, return receipt requested, copies of the First Restated CC&Rs and a ballot to the Lenders. The letter informed the Lenders that their signature on the "green" card would be deemed their written consent, unless a ballot was returned within thirty (30) days. Seventy-five percent (75%) of the Lenders consented, or were "deemed" to have consented to the First Restated CC&Rs. The court held that indicating a signature on the Return Receipt "green" card would be considered an approval to amend the CC&Rs. The court further held that owners challenging a provision of the CC&Rs

must show it lacks reasonableness which is defined as it being arbitrary or capricious, violating the law or fundamental public policy or otherwise imposing an undue burden on the property. Short of an owner proving these elements, a provision of the CC&Rs will be deemed reasonable. The Superior Court granted the petition. Owner appealed on many grounds, all were rejected by the Appeals court.

Holdings: The Court of Appeal, McConnell, P.J., held that:

(1)balloting by mail was authorized;
(2) written consent from lenders was adequate;
(3) **association** made reasonably diligent effort to permit all eligible owners to vote;
(4) proposed amendments were reasonable;
(5) length of extension of condominium agreement was not limited to 20 years;
(6) owner had no right to post signs in common areas advertising sale or lease of her unit; and
(7) reduction in percentage of votes required to amend did not unconstitutionally impair contract rights.

3. Pacific Hills HOA v. Prun 160 Cal. App.4th 1557

Background: Homeowners' association brought action against members for breach of declaration of covenants, conditions, and restrictions, nuisance, and declaratory and injunctive relief. The Superior Court ordered members to move or lower their gate and fence, on condition that association agreed to pay two-thirds of cost upon timely request. Parties cross-appealed.

The architectural guidelines adopted by the Association limited fences to 6 feet in height unless they are within 20 feet of the property line, in which case the maximum height is 3 feet. The trial court found for the Association and ruled that the Owner must lower the size of the gate to 3 feet or set it back to at least 20 feet from the property line. If owner chose to move the fence, and gave timely notice to the Association, the Association was required to pay 2/3 of the relocation costs. If owner did not give timely notice, the Association would not have to pay. Or, if the Association refused to pay for 2/3 of the relocation costs despite timely notice, the injunction would dissolve and owner would be allowed to keep the fence as built.

Holdings: The Court of Appeal affirmed the judgment and held that:
(1) action was within statute of limitations;
(2) claim was not barred by aches;
(3) association acted fairly, reasonably, and uniformly in enforcing restriction; but
(4) conditional injunction was proper.

4. **Mission Shores Association v. Pheil (2008) 166 Cal. App. 4th 789**
The appeals court upheld a trial court ruling granting a petition to reduce the percentage of member approval, pursuant to Civil Code1356. The amendment proposed to require leases of homes within the community to be over 30-days and would also provide the association with authority to evict tenants for CC&R violations. The court found the 30-day minimum lease requirement was a reasonable amendment to the CC&Rs in order to ensure a residential community is not used for hotel-like or transient purposes. The court further found it is reasonable to provide an association with landlord-like remedies (e.g. eviction rights)

should members renting their units fail to ensure their tenants are not in violation of the association's CC&Rs. The defendant's argument that the ruling should be stricken because it did not obtain any mortgagee's approval was found unpersuasive given these amendments did not impair the underlying mortgages on the properties, nor their rights.

5. Ritter & Ritter Inc. v. The Churchill Condominium Association Second Appellate District Case Number B187840

The Churchill is a 110 unit condominium building located in Westwood. The Churchill is constructed of a series of horizontal concrete slabs. The ceiling of each unit is actually a "drop ceiling" below the next concrete slab. Above the drop ceiling is an area called the "plenum". The various pipes and ducts branch out sideways through the "plenum" and then go up into each unit through slab penetrations (i.e. hole) made in the concrete slab during the buildings original construction. Despite architectural plans and a city permit requirement that the slab penetrations be "fire proofed", the fire proofing did not occur. The lack of fire proofing caused cigarette fumes to enter into the unit, which the Ritters wanted fixed. The Ritters hired their own expert engineer who conducted his own investigation. He reported that the source of the odors was the slab penetrations and offered his opinion that these holes constituted a fire hazard and should be filled or fire stopped. The Board hired a professional engineer and a ventilation system expert to investigate the source of the problem. Their expert reported that the problem was caused, in part, by the slab penetrations in the Ritter's unit 3J's floor.

After receiving its expert's report and conducting its investigation and communication with the Ritters, the Board concluded the Ritters were responsible for making the holes in the slabs and therefore they were also responsible for fixing them. Further, the Board concluded that The Churchill did not have a legal obligation to fill such holes because they were "existing, non-conforming" conditions and the Ritters were required by law and by the CC&R's to fill the penetrations adjacent to their own units. The Board notified the Ritters of their decision in writing. It attached a bid from a contractor offering to complete the work adjacent to their units for approximately $2,700 per unit. The Ritters declined the Board's offer.

The Ritter's filed suit and sought financial damages and an injunction requiring the Churchill to fill the slab penetrations. They sought $200,000 for diminution of value. Churchill cross-complained to require the Ritter's to fill the slab penetrations and for recovery of the $200 daily fine imposed for failure to fill the slab penetrations. At the time of trial, the fines had exceeded $77,000.

Post trial, the trial court awarded the Ritters $531,159 as the prevailing party, which was 100% of their attorney's fees. The court reasoned that because the Ritters were found by the jury to not be liable for the $77,000 in fines, they were the prevailing party. The court denied the Churchill motion for over $700,000 in attorneys' fees finding that they did not prevail. They argued they were the prevailing party as the Ritters were unsuccessful in forcing them to fill the slab penetrations. Aside from affirming the trial court ruling that the Churchill did not need to "fire proof" the slab, the court did find that the Churchill is in breach of the CC&R's but the individual board members were not liable for damages for the breach. The Appellate court affirmed the finding of the trial court that the Ritters accomplished their main litigation objective and were therefore the "prevailing party".

6, Ekstrom v. Marquesa at Monarch Beach HOA

On December 1, 2008, Division Three of the Fourth Appellate District, filed its opinion in Ekstrom v. Marquesa at Monarch Beach HOA (the unpublished opinion was initially filed November 3, 2008).

Background: Marquesa at Monarch Beach is a common interest development comprised of single family homes in the Monarch Beach development of Dana Point, many of which have ocean and golf course views. Plaintiffs are individual homeowners within the development whose views have been blocked by palm trees (some planted by the initial developer, some by the homeowners) which have grown to heights exceeding the rooftops. Because trimming a palm tree would effectively require its removal, the Association has, for years, taken the position that the CC&Rs' express requirement that "[a]ll trees" on a lot be trimmed so as to not exceed the roof of the house on the lot, unless the tree does not obstruct views from other lots, does not apply to palms. Accordingly, the Association's Board of Directors denied the Plaintiffs' demands that the CC&Rs be enforced and that the palms be trimmed, topped or removed.

Holding: Finding the language of the Association's CC&Rs to be clear and not at all ambiguous, the Appellate Court held that the rule of judicial deference for Board decisions adopted by the California Supreme Court in Lamden v. La Jolla Shores Clubdominium Homeowners Association "Lamden") (1999) 21 Cal.4th 249 (which is itself an adaptation of the business judgment rule), does not apply where the Board of Directors' decision was outside the scope of its authority granted by the CC&Rs. Thus, the Association's Board may not simply choose to ignore or exclude "an entire species of trees" from the mandate of the CC&Rs. In addition, there is no application of the rule of judicial deference where the Association's rules and/or regulations are in "direct conflict" with the CC&Rs. Impact: In reaching its conclusion, the Appellate Court distinguished Harvey v. Landing HOA (2008) 162 Cal.App.4th 809, where the court deferred to the association's chosen method for enforcing the CC&Rs. In that case, the court concluded the association's board acted according to the authority granted to it by the CC&Rs. In Ekstrom, the Court concluded the Board acted in a manner inconsistent with the Association's CC&Rs. Thus, together, Harvey and Ekstrom stand for the proposition that Boards can act to maintain, control and manage the common areas, so long as the Board does so in ways consistent with the dictates of the CC&Rs.

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